IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

[2021] NZACC 91 **ACR 322/19**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	OSAMA RAZEK Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 19 May 2021

Heard at: New Plymouth/Ngamotu

Appearances: Mr L Hansen for the appellant
Mr M Campbell and Ms B Walley for the respondent

Judgment: 29 June 2021

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Manner of Making a Claim s 60 Accident Insurance Act 1998]

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[1] This is an appeal by the appellant against his unsuccessful review of the respondent's decision to backdate his independence allowance to 4 April 2017.

[2] The Reviewer found that there was no evidence that the appellant lodged a claim with the respondent in or around January 2000. The appellant's position on this appeal is that the relevant claim was lodged in or around January 2002.

[3] It is the respondent's position that the appellant's account is inconsistent with his prior statements and conduct and unsupported by any independent evidence and

that as the matter has been advanced for the first time some 17 years after the events in question, the respondent is significantly prejudiced in responding to the allegations by that delay.

Background

[4] The appellant was born in Egypt in 1957. It is unclear from the papers when he arrived in New Zealand. However, it is recorded that he had a number of ACC claims in the 1990s, and he received Interferon treatment for hepatitis at Taranaki Base Hospital for nine months from June 1999.

[5] In 2000 this treatment stopped when the appellant developed type 1 diabetes, originally diagnosed as being type 2 diabetes.

[6] On 4 April 2017, Dr Shaun Butler lodged a claim for cover for diabetes mellitus type 1 on behalf of the appellant. Following a review decision, the appellant was granted cover for this injury on 19 December 2018.

[7] On 11 February 2019, the respondent informed the appellant that he was eligible for an independence allowance under the 1998 Act. An impairment assessment undertaken resulted in the appellant's impairment being assessed at 59%. On this basis ACC approved the appellant's independence allowance backdated to when the claim was lodged on 4 April 2017.

[8] The appellant took this decision to review, and on 9 December 2019 the Reviewer declined to backdate the independence allowance further because there was no evidence to establish an earlier date of claim lodgement than 4 April 2017 stating, "that is the earliest date for which the independence allowance can be backdated".

[9] The appellant appealed against this decision on 20 December 2017.

The Appellant's Submissions

[10] Mr Hansen, on behalf of the appellant, frames the issues before the Court:

(a) Did the appellant lodge a claim under s 54 of the AIA as required under s 60 in or around January 2002?

(b) If the Court finds that the applicant did lodge a claim, then did ACC assist the appellant in his claim under s 63 and investigate the claim under s 65?

(c) If the Court finds that ACC did not comply with ss 63 and 65, then has the claim been deemed to have been accepted by ACC under s 66?

[11] Mr Hansen refers to the appellant's affidavit of 11 May 2020. In his affidavit he deposes to the fact that on 27 March 2000 he was admitted to Taranaki Hospital by Dr White and diagnosed with type 1 diabetes as a result of Interferon treatment.

[12] He said that at the time he had a back injury and that his contact person at ACC in respect of this was Catherine Barratt.

[13] The appellant says that Ms Barratt knew of the appellant's diabetes and told him many times over the telephone that his diabetes was his problem and that she was going to stop weekly compensation for his back and that he should go back to work full time.

[14] The appellant says that in or around late April 2000 Dr White mentioned to him that he should approach ACC for a treatment injury claim.

[15] Produced to the Court is a letter dated 26 April 2000 from consultant physician Campbell White addressed to the appellant's GP. In the letter Mr White said:

> I reviewed Mr Razek today. You will recall he was admitted to hospital with acute onset of diabetes. This possibly is a complication of Interferon therapy. …

[16] In his affidavit Mr Razek says he went to ACC's New Plymouth branch in January 2002 with a copy of Mr White's letter. He says "the lady at ACC reception

did give me a form to fill in. I filled it in and I handed it back to the lady at reception with Dr White's letter dated 26 April 2000".

[17] The contemporary record from ACC from early 2002 appears to be focused on rehabilitation from his back injury. On 4 March 2002, Ms Barratt, his case manager notes:

> I met with Osama on 31 January 2002 to conduct an initial occupational assessment. He had not completed the preliminary assessment forms which I require in order to complete the IOA but advised that he would do so and post these to me. I chased him up last week as the information had still not arrived. He advised that it had been posted but he would check to make sure. I telephoned again today as I had still not received anything from him. He advised that he had posted it to me but if I send the forms out to him again he will see what he can do.
>
> Osama then mentioned that his liver function tests are very high and he is on sick leave and could not deal with ACC matters at the moment. He mentioned something about specialist care under private medical insurance which covers his hepatitis C and diabetes. I said that I would have to advise ACC as they are expecting me to complete an initial occupational assessment on him and would that be ok. He said yes but reiterated it was not really ACC's concern.
>
> The difficulties I am experiencing with Osama are:
>
> > He does not appear to have a clear understanding of his obligations under ACC.
> >
> > His situation is complicated by his hepatitis C and diabetes which seem to be impacting on his ability to work.
> >
> > He can be difficult to understand at times.

[18] Ms Barratt further noted that up until taking sick leave, the appellant advised that he could work four to six hours per day, five days per week.

[19] Ms Barratt noted five alternative work options for the appellant. She also noted:

> Osama did not advise how long he would be off work on sick leave.

[20] In a further note by Ms Barratt, again dated 4 March 2002, she says:

> Client (at) counter to see where to from here.
>
> He advised he travelled to Whanganui which caused increased pain and he was unable to increase his work hours as per the ARC18.

> He advised he really wanted to get back to work but was not going to work if it affected his health and increased his pain.

[21] In his affidavit the appellant says that when he went to ACC New Plymouth branch in January 2002 "… the lady at ACC reception gave me a form to fill in … I filled it in and handed it back to the lady with Mr White's letter dated 26 April 2000."

[22] He says he received a telephone call from Ms Barratt who wanted a meeting on 25 January 2002. The appellant said he could not do that date, so the meeting was arranged for 31 January 2002. He says: "Catherine said she wanted to discuss my diabetes claim and rehab plan".

[23] The appellant then says:

> Catherine said she had read Dr White's letter and she got advice that my diabetes was associated with being a hepatitis C carrier and that I was type 2 not type 1.
>
> Catherine said "therefore my claim wouldn't be eligible", or words to that effect.
>
> Despite what she said I asked her to forward my claim to the ACC medical unit.

[24] He says that Ms Barratt also said she had written to his GP to give the appellant a full clearance back to work from his back injury as his problem was actually his diabetes.

[25] The appellant summarised his position as follows:

> I did fill in a claim form for a medical treatment injury and gave it to ACC in January 2002.
>
> At the meeting with Catherine on 31 January 2002 she did have the claim form with her but she made the decision that my diabetes was not covered by ACC.
>
> I asked Catherine to take further up, to the ACC medical unit, because I didn't agree with her decision.
>
> I don't know what Catherine did with the claim form after that.

[26] Mr Hansen notes that the respondent's contact logs do not show any telephone call to the appellant recorded in early or mid-January 2002 by Ms Barratt. However, it does appear from the entry of 4 March 2002 that the meeting of 31 January 2002

included an initial occupational assessment, and there was reference to his hepatitis C and diabetes.

[27] Mr Hansen refers to the affidavit of Ms Tinson on behalf of ACC, dated 11 June 2020.

[28] Mr Hansen notes that the standard practice is for the treatment provider to lodge the claim; it has never been the practice to accept claims through the reception desk at an ACC office. She also notes that "ACC would have required a treatment provider to initiate a claim by completing a first claim form called an ACC45".

[29] Mr Hansen then refers to ss 54 and 58. Section 54 provided that an insured may claim against an insurer for:

> (a) Cover for his or her personal injury.

[30] He also notes that s 58(1) says:

> For all the purposes of this Act, a claim under section 54(a) or (b) is lodged and received on the date on which the receiving insurer receives a claim lodged in accordance with this part.

[31] Mr Hansen notes that Ms Barratt's notes of the meeting of 31 January 2002 were not completed until 4 March 2002 and that logically this suggests that she did not take proper records during this period.

[32] Mr Hansen refers to s 60 requiring the insured to lodge the claim with the insurer in a manner specified by the insurer. Subsections (2) and (3) of s 60 speak of reasonable requirements and compliance.

[33] Mr Hansen submits that although Ms Tinson states that no claim forms were at ACC's office in New Plymouth, this does not advance the matter.

[34] He notes that in *Naysmith v Accident Compensation Corporation* Baragwanath J said: "There is nothing to prevent [an application] being made by a Corporation officer on behalf of an injured person."[1]

He also notes Mallon J's comment in *Rangiwhetu v Accident Compensation Corporation*: "It would be inequitable if claimants were denied entitlements because of an overly strict approach to the form of application required."[2]

[35] Mr Hansen submits:

> 48. The essence of *Rangiwhetu* is that a claim needs to be in writing, insofar as it is within the ability of the insured to do so under section 60(2), and this "in writing" only needs to be "something in writing" taking into account all communications with ACC.
>
> 49. In applying a generous and unniggardly approach, it is submitted, in ACC's alternative argument, the form itself should not be taken as predominant over the information. This being that ACC needs to consider a claim even if it is on the wrong form if the information in that form suggests a claim for cover.

[36] Mr Hansen then refers to the obligations of the insured and ACC set out in ss 63 and 65 relating to claims for medical misadventure.

[37] Mr Hansen refers to *McCormick v Accident Compensation Corporation.*[3]

[38] In that case the information provided by the appellant was insufficient for a valid claim, and the respondent provided a letter to the appellant that included a treatment detail sheet for completion. Accordingly, Mr Hansen submits that in not providing similar assistance in this case, the respondent failed in its obligation to assist the appellant in making his claim.

[39] He submits that the respondent then had to make a decision or extend the investigation under s 65 and that if it did not do so, then s 66 comes into play deeming cover for the medical misadventure.

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1 *Naysmith v Accident Compensation Corporation* [2006] 1 NZLR 40 (HC) at [63].
2 *Rangiwhetu v Accident Compensation Corporation* HC Wellington CIV-2006-485-1402, 19 April 2007 at [48].
3 *McCormick v Accident Compensation Corporation* DC Wellington 86/2003, 9 May 2003.

[40] Mr Hansen submits that Ms Barratt did not have the authority to hold the claim from being lodged and received by ACC and that once the claim was handed over the counter ACC's obligation was to receive the claim after deciding it had been lodged correctly.

[41] He submits that once lodged, ACC's obligations were to assess the claim under ss 63 and 65 and that this did not happen.

[42] He therefore submits that s 66 applies and the appellant is deemed to have cover for the claim.

The Respondent's Submission

[43] Mr Campbell summarised the respondent's position as follows:

(a) There is insufficient evidence that the appellant lodged his claim at any date earlier than 4 April 2017, and therefore, that is the earliest date for which an independence allowance can be backdated;

(b) Mr Razek's account is inconsistent with his prior statements and conduct, and is unsupported by any independent evidence;

(c) This matter has been advanced for the first time some 17 years after the events in question, and the respondent is significantly prejudiced in responding to the allegations by that delay;

(d) If it is accepted that the appellant did lodge his claim in 2002, his cover entitlement for his diabetes would need to be assessed under the medical misadventure provisions of the Accident Insurance Act 1998.

[44] Mr Campbell notes that the independence allowance provision of cl 63(b) of Schedule 1 of the 1998 Act states:

> The insurer is liable to pay the independence allowance on and from the date on which the insured lodged the claim for cover for the personal injury from which the impairment results.

[45] Mr Campbell submits that the appellant's recollection of what occurred cannot be regarded as reliable. He submits at 3.4(a) of his submissions:

> His affidavit is inconsistent with his previous position. At the review hearing he argued that he attended the New Plymouth branch of ACC around August 2000 and was dissuaded from lodging a claim.

[46] Mr Campbell also notes that following his cover claim being declined in 2018, he successfully reviewed the decision but that at no point was it suggested that a claim for cover had been advanced in 2000 or 2002.

[47] Mr Campbell also notes that according to Ms Tinson's affidavit, the appellant has successfully lodged by a treatment provider some 55 claims dating back to the 1990s, and it may be concluded that he is familiar with the claims process.

Decision

[48] The evidence before the Court reveals that on 27 March 2000 the appellant, then aged 42, was admitted to hospital with acute onset of insulin dependent diabetes. Prior to that, since June 1999, he had been receiving Interferon therapy to treat hepatitis. The consulting surgeon at the time, Mr White, said in a report of 26 April 2000 regarding the acute onset of diabetes:

> This possibly is a complication of Interferon therapy.

[49] The Interferon therapy was stopped due to the diabetes with Mr White saying in his report:

> It will be unwise to carry on with Interferon and Ribavirin therapy.

[50] Although the physician's words are measured and there are no other medical reports or opinions on the origins of the appellant's diabetes, I am able to conclude on the balance of probabilities that the Interferon treatment caused the diabetes for the following reasons:

(a) The onset of diabetes was acute.

(b) The onset of diabetes was serious and required admission to hospital.

(c) The physician says that the onset was possibly a complication of Interferon therapy and makes no mention of any other possible causes. He reiterates this in his later report of 12 July 2000.

(d) No evidence as to a different origin of the appellant's diabetes has been placed before the Court.

[51] In a perfect world the appellant would at that point, in April 2000, have completed an ACC claim form with his GP or physician and sought cover on the basis that he had suffered personal injury caused by medical misadventure as defined by s 35 of the Accident Insurance Act 1998, that is to say:

> Personal injury caused by … medical mishap. (Section 35(1)). This includes personal injury caused by –
>
> > "A complication the insured suffers later because of the treatment given to him" and "occurs at the time of the treatment". (Section 35(2)(b)).

[52] Section 37(1) defines "medical mishap":

> **37 Medical mishap**
>
> (1) "Medical mishap" means an adverse consequence of treatment, when:
>
> (a) The treatment is given to an insured, is given properly, and is given by or at the direction of a registered health professional; and
>
> (b) The adverse consequence is suffered by the insured; and
>
> (c) The adverse consequence is severe (as defined in subsection (2)); and
>
> (d) The likelihood the treatment of the kind that was given would have the adverse consequence is rare (as defined in subsections (3) and (4)).

[53] One of the severe adverse consequences defined in s 37(2) is:

> (c) Suffering significant disability lasting more than 28 days in total.

[54] Section 37(3) defines "rare" as "only if the probability is that the adverse consequence would not occur in more than 1% of cases in which the treatment is given".

[55] The precise answer to the latter point would have to be determined by the state of medical knowledge in April 2000 of the statistical percentage risk of Interferon treatment causing type 1 diabetes.

[56] However, amongst the documents before the Court is ACC form 7411 – Treatment Injury Medical Advice Response dated October 2018 which includes a reference to Japanese data (undated) that the rate is less than 1% and a Dutch study (undated) at 2.6%.

[57] It would have been helpful, in view of the timing of the appellant's onset of diabetes, and the "less than 1%" requirement of the legislation at the time, if the writer of the ACC 7411 form had identified just when the "less than 1% research" and the "2.6% research" first became known.

[58] This undated and conflicting data excepted, I would otherwise have little doubt that the appellant suffered a medical misadventure injury that would have afforded him cover under the 1998 Act.

[59] In the case of one research paper saying less than 1% and the other saying 2.6%, which one is more correct? A *Harrild* unniggardly approach would favour accepting the research that placed the risk at less than 1%.[4] Thus, the appellant would come within the cover definition.

[60] The appellant says in his affidavit that at the time (2000) he was dealing with Ms Barratt over his back injury. He says:

> 7. Catherine knew of my diabetes and told me many times over the phone that my diabetes is my problem and that she was going to stop my weekly compensation for my back and I should go back to work full time.
>
> 8. Catherine said that ACC was not responsible and despite what Dr White said, ACC's position was that my diabetes was just an illness.

[4] *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA).

…

10. In or around April 2000 Dr White mentioned to me that I should approach ACC for a treatment injury claim.

[61] There is then, according to the appellant's narrative, an unexplained gap of time until January 2002 when the appellant says that he completed and handed over at the ACC office what was inferentially a claim form for diabetes.

[62] From ACC's file notes, what was plainly uppermost in Ms Barratt's mind at the time of the meeting with the appellant on 31 January 2002 was assessment of his back injury.

[63] Also, she makes the comment:

> Osama then mentioned his liver function tests were very high and he is on sick leave and could not deal with ACC matters at the moment.

[64] I accept that this is an honest portrayal by Ms Barratt of the appellant's presentation at the time.

[65] She then records:

> He mentioned something about specialist care under private medical insurance which covers his hepatitis C and diabetes. I said that I would have to advise ACC as they are expecting me to complete an initial occupational assessment on him and would that be ok. He said yes but reiterated that it was not really ACC's concern.

[66] She then added:

> The difficulties I am experiencing with Osama are:
>
> > He does not appear to have a clear understanding of his obligations under ACC.
> >
> > His situation is complicated by his hepatitis C and diabetes which seem to impacting on his ability to work.
> >
> > **He can be difficult to understand at times**.
> >
> > [Emphasis added]

[67] So, it is possible that the reference to "medical insurance" in Ms Barratt's note of the conversation with the appellant may well have derived from a jumbled understanding on the part of Mr Razek, of advice others, (not necessarily Ms Barratt), had given him. It may have been intended to be a reference to the Accident Insurance Act, misinterpreted as a reference to private medical insurance.

[68] The obvious candour of Ms Barratt's report is helpful. I conclude that given the language challenges as well as the serious health challenges that the appellant faced at the time, it would have been completely understandable that his efforts to understand what he may have been entitled to, resulted in some confusion.

[69] I find, therefore, that it would have been extremely difficult for the appellant without some advocacy on his behalf from a doctor or other third party at the time, to lodge a medical misadventure claim.

[70] Ms Barratt's understandable focus in 2002 was on rehabilitation for the appellant's back injury.

[71] Ordinarily, of course, type 1 diabetes is not caused by an accident and from the scant note of 4 March 2002, it appears her understanding was that his hepatitis C and diabetes were grouped together "under private medical insurance" as they would be in almost all cases. That is if they did not arise as a result of treatment injury.

[72] On the file is a medical clinic note from 2005 which records:

> Diabetes developed during Interferon/Ribavirin therapy 2000.

[73] In 2008 there is a note:

> Diagnosis listed as insulin deficient diabetes secondary to Interferon treatment.

[74] On 2 May 2017, Mr White, consultant physician, noted to ACC:

> Diabetes would be regarded as an extremely rare complication of Interferon therapy and this is not usually discussed with the patient because of its rarity …

[75] The fact that the above notes exist is helpful. In essence the notes comprise a commentary on the origins of his diabetes from the time he contracted the disease in 2000.

[76] This commentary includes discussion on the proposition that his diabetes may have arisen from his Interferon treatment, leading to the review decision granting him cover for a treatment injury.

[77] There is nothing in the available medical commentary that suggests that ACC has been prejudiced by the delay in making the claim in 2017, or indeed earlier. That diabetes might be caused by Interferon treatment was known and raised by physician Mr White in 2000.

[78] The ultimate question here is whether the evidence and inferences from it show that the appellant has done enough for the Court to accept that he has a treatment injury claim for diabetes from 4 March 2002.

[79] With the right advice and guidance regarding a diabetes claim at the time, I conclude from the above analysis that cover would have been granted in 2002.

[80] In *Rangiwhetu v Accident Compensation Corporation* Mallon J said:[5]

> The question is not whether a written application was required, but whether a written application for attendant care was made in May 1995. If it was, the next question is whether it satisfied the requirements of the Act that it be itemised and signed. To answer these questions I consider that a generous and unniggardly approach should be taken … It would be inequitable if claimants were denied entitlements because of an overly strict approach to the form of application required.

[81] Justice Mallon added in a footnote:[6]

> Although *ACC v Mitchell* [1992] 2 NZLR 436 and *Harrild v Director of Proceedings* [2003] 3 NZLR 289 both concerned taking an unniggardly approach to what constituted a personal injury, the same approach should apply to how a person accesses cover they are entitled to.

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5 *Rangiwhetu v Accident Compensation Corporation*, above n 2, at [48].
6 At fn 11.

[82] Therefore, I accept Mr Hansen's submission that there was something "in writing" here in the form of Ms Barratt's file notes that an "insurance" claim was being made for his diabetes, which I have found to have been caused by medical misadventure under the 1998 Act. To find otherwise would be ungenerous and niggardly and arguably discriminatory against those for whom English is a second language.

[83] Having found thus, s 66 of the Act is applicable with the appellant having deemed cover for medical misadventure from 4 December 2002, being nine months after Ms Barratt's file note.

[84] It follows that the appeal is allowed and the review decision of 11 November 2019 declining the backdating of the appellant's independence allowance is quashed.

[85] Should there be any issue as to costs, counsel have leave to file memoranda in respect thereof.

Judge C J McGuire
District Court Judge

Solicitors: Tungsten Legal Limited, New Plymouth for the appellant
Russel McVeagh, Auckland for the respondent